EX POST FACTO IN THE CONSTITUTION

ANY study of the *ex post facto* clauses of the Constitution[1] which did not commence with a consideration of *Calder* v. *Bull*[2] would not conform to good practice. The text writers and the commentators uniformly begin their treatment of *ex post facto* laws by citing it as the leading case, and setting forth its doctrine. There is singular agreement as to the correctness of the holding of the case.[3] The statement given by Cooley is typical: "At an early day it was settled by authoritative decision, in opposition to what might seem the more natural and obvious meaning of the term *ex post facto,* that in their scope and purpose these provisions were confined to laws respecting criminal punishments, and had no relation whatever to retrospective legislation of any other description."[4] This doctrine of *Calder* v. *Bull* is so well settled as to have become one of the commonplaces of American constitutional law.

Though the doctrine be well settled at present, it did not go unchallenged at the time of its enunciation. Both jurists and commentators questioned its soundness during the early part of the nineteenth century. Story, while accepting the ruling of the case, does so largely upon the ground that it had been long settled as correct law, and intimates that if the question were to be reopened he would be willing to give a different interpretation serious con-

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[1] Constitution of the United States, art. I, sec. 9, clause 3; also sec. 10, clause 1.

[2] 3 Dallas 386 (1798).

[3] Cf. COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW (Ed. 3), p. 312; KENT, COMMENTARIES ON AMERICAN LAW (Ed. 12, Holmes), vol. 1, p. 409; MCCLAIN, CONSTITUTIONAL LAW IN THE UNITED STATES (1905), p. 98; WILLOUGHBY, ON THE CONSTITUTION, vol. 2, p. 803; HALL, CONSTITUTIONAL LAW, p. 93; WATSON, THE CONSTITUTION OF THE UNITED STATES, ITS HISTORY, APPLICATION AND CONSTRUCTION (1910), vol. 1, p. 739; BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW, p. 709; MILLER LECTURES ON THE CONSTITUTION OF THE UNITED STATES (1891), p. 586. These writers vary somewhat as to the degree of positiveness with which they set forth this doctrine, some merely stating that the case is a leading one and that its doctrine is the law; others assert that the case is the correct exposition of the Constitution.

[4] COOLEY, CONSTITUTIONAL LIMITATIONS (Ed. 7), p. 373.

sideration.[5] Justice William Johnson of the Supreme Court severely criticised the decision of *Calder* v. *Bull*.[6] Professor Corwin, writing of *Fletcher* v. *Peck* in "John Marshall and the Constitution," portrays Marshall as disapproving of the ruling of the court in the *Calder* case.[7]

The issue involved in the case of *Calder* v. *Bull* was whether an act of the Connecticut legislature which set aside a decree of a probate court was *ex post facto* or not. In other words, did civil cases come within the prohibition restraining the states from passing any *ex post facto* law? While each of the justices sitting in the case filed an opinion, that of Justice Chase is generally accepted as the definitive exposition of *ex post facto* laws. He based his opinion upon the usage of the term *ex post facto* in the state constitutions, its usage at common law, its position in the text of the Constitution of the United States, and the intent of the framers of the Constitution.

Of the justices who sat in the case, only one was a member of the convention which framed the Constitution.[8] For this reason it is not possible to accept the assertion of Justice Chase, without

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[5] STORY, COMMENTARIES ON THE CONSTITUTION (Ed. 5, Bigelow), vol. 2, p. 219. Concerning the argument that *ex post facto* laws should be interpreted to mean laws affecting civil as well as criminal cases, Story says: "As an original question, the argument would be entitled to grave consideration. * * *"

[6] See his opinion in Satterlee v. Matthewson, 2 Peters 414, and also Appendix, note 1, p. 681. Of this exposition of the meaning of the term as used in the Constitution, Story wrote: "The terms, ex post facto laws, in a comprehensive sense, embrace all retrospective laws, or laws governing or controlling past transactions, whether they are of a civil or a criminal nature. And there have not been wanting learned minds that have contended, with no small force of authority and reasoning, that such ought to be the interpretation of the terms in the Constitution of the United States." In a note, Story refers directly to Johnson's opinion. STORY, COMMENTARIES (Ed. 5), vol. 2, p. 219, and note 1.

[7] CORWIN, JOHN MARSHALL AND THE CONSTITUTION, p. 154: "However, Marshall apparently fails to find entire satisfaction in this argument, for he next turns to the prohibition against bills of attainder and *ex post facto* laws with a question which manifests disapproval of the decision in Calder v. Bull. Yet he hesitates to overrule Calder v. Bull, and indeed, even at the very end of his opinion, he still declines to indicate clearly the basis of his decision."

[8] Justice Patterson.

confirmation from the records of the Federal convention itself, when he says: "All the restrictions contained in the Constitution of the United States on the power of the State legislatures were provided in favor of the authority of the Federal government. The prohibition against their making any *ex post facto* laws was introduced for greater caution, and very probably arose from the knowledge that the Parliament of Great Britain claimed and exercised a power to pass such laws under the denomination of bills of attainder, or bills of pains and penalties; the first inflicting capital, and the other less, punishment. * * * To prevent such, and similar, acts of violence and injustice, I believe, the Federal and State Legislatures were prohibited from passing any bill of attainder, or *ex post facto* law."[9] We may also be allowed to test his statement that the term *ex post facto* was used in a technical sense in the Constitution, by whatever evidence is available. Did the framers of the Constitution use the term *ex post facto* in a technical sense, did the people who were members of the state conventions which ratified the Constitution understand it to be used in a technical sense, and what was the general meaning attributed to the term by common usage at that time? The answer to these questions if affirmative, would give historical support to the position taken by Justice Chase. If the answers be negative, they would seem to weaken his position considerably. The purpose of this study is to determine, if possible, what was included in the term *ex post facto* when it was placed in the Constitution of the United States. On account of the meagerness of the information which we have concerning the debates in both the federal convention and the state ratifying conventions, it is almost impossible to give an unqualified answer to these questions.

The *ex post facto* clauses were late in being incorporated into the Constitution. The first attempt to place a prohibition upon Congress with respect to the passage of *ex post facto* laws occurred in the session of Wednesday, August 22, when Madison reports that "Mr. Gerry & Mr. McHenry moved to insert after the 2d. sect. Art: 7, the Clause following, to wit, The Legislature shall pass no bill of attainder nor any ex post facto law."[10] Gerry spoke in favor

[9] 3 Dallas 389.

[10] HUNT, GAILLARD, AND SCOTT, JAMES BROWN, MADISON'S DEBATES (Inter-

of the motion, expressing the opinion that there was more need for such a prohibition on the national legislature than on the state legislatures. Gouverneur Morris opposed that portion of the motion dealing with *ex post facto* laws, but favored that portion forbidding bills of attainder. Ellsworth and Wilson both thought it unnecessary to prohibit *ex post facto* laws, the latter thinking that it would reflect ignorance of the "first principles of legislation." There seemed to be agreement as to the desirability of prohibiting Congress from passing bills of attainder, and this portion of the motion was agreed to. The second part of the motion was then taken up.

Carroll observed that legislatures had passed *ex post facto* laws and they had taken effect, regardless of the views of the people. Wilson opposed any prohibition on Congress in this matter, saying that if they had proven to be of no use in the state constitutions they would be of no use in the Federal Constitution, and that "both sides will agree as to the principle, but will differ as to its application." Williamson called attention to the fact that such a prohibition existed in the constitution of North Carolina, and that while it had been disregarded it had nevertheless served as a guide to the judges. But Doctor Johnson thought the clause unnecessary "and implying improper suspicion of the National Legislature." Rutledge favored the clause. The vote on the latter portion of the motion resulted in its passage.[11] There is nothing in Madison's record which gives any light on whether the term was used in a technical sense or not.

The next mention made of the term in Madison's debates is in connection with a prohibition on the states. "Mr. King moved to add, in the words used in the Ordinance of Congs. establishing new States, a prohibition on the States to interfere in private contracts."[12]

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national ed.), p. 449. It will be noted that bills of attainder and *ex post facto* laws were to be placed in another connection in the next report of the Committee of Detail. The discussion at this point was in connection with Article VII, section 2, as reported by the Committee of Detail, August 6. See above, p. 341.

[11] HUNT & SCOTT, *op. cit.*, p. 450. The vote by states is given by Madison as follows: "N. H. ay. Mas. ay. Cont. no. N. J. no. Pa. no. Del. ay. Md. ay. Virga. ay. N. C. divd. S. C. ay. Geo. ay." Connecticut, New Jersey and Pennsylvania voted against the prohibition.

[12] *Ibid.*, p. 478. Session of Tuesday, August 28.

But Gouverneur Morris thought that this was going too far. His opinion was that "within a state itself a majority must rule, whatever may be the mischief done among themselves." Sherman then asked, "Why then prohibit bills of credit?" Col. Mason also seemed to think that the prohibition was extreme, for he believed that there were cases where a state must make provisions and it was not proper to tie the hands of the state in the matter. Wilson answered that "*retrospective* interferences only are to be prohibited." At this point Madison asked a very significant question, "Is not that already done by the prohibition of ex post facto laws, which will oblige the Judges to declare such interferences null & void?" Mr. Rutledge moved instead of Mr. King's motion to insert, "nor pass bills of attainder nor retrospective laws," on which motion the vote was seven to three in favor of the motion.[13]

From the conversation which Madison reports a number of significant facts are to be learned. One of the most striking things in this connection is Madison's question. He is evidently of the impression that *ex post facto* applies to civil as well as to criminal matters. It is odd that no member of the Convention took the trouble to inform him that he was laboring under a serious misapprehension. It is hardly credible that such a slip should be permitted without some member calling it to his attention. Madison does not record any answer given to his query.

Another fact of interest is the connection in which the matter arose. The conversation evidently began over a proposed prohibition on the states regarding contracts. Contracts are a severely civil matter. Rutledge's motion was a substitute for the motion offered by King. Shortly before this took place Sherman had expressed his opinion that this was "a favorable crisis for crushing paper money."[14] The whole setting of the debate was civil in character.

For the purpose of this study the wording of the substitute motion which was offered by Rutledge is very important. This was the motion which was adopted. It read, as reported by Madison, "nor pass bills of attainder nor *retrospective*[15] laws." In a note Madison

[13] HUNT & SCOTT, *op. cit.*, 479.

[14] *Ibid.*, 478.

[15] *Ibid.*, 479. (Italics are mine.)

calls attention to the fact that the printed Journal contains the words "ex post facto" instead of *retrospective*.[16] FARRAND'S edition of the RECORDS OF THE FEDERAL CONVENTION OF 1787 gives the same note by Madison, but in an additional note gives the following: "The Journal is correct, according to marginal notes in the Washington and Brearly copies of the report of the Committee of Detail."[17] For the purpose of this study it is not decisive which of these may be correct. It is evident that the two terms, *ex post facto* and *retrospective,* were used synonymously. It is improbable that Madison alone understood the terms to have the meaning he attaches to them. It is hard to escape the conclusion that in this connection at least the members of the convention did not have in mind the technical meaning of *ex post facto* laws. During the entire debate recorded in this connection there is a notable absence of anything pertaining to criminal affairs.

The following day, August 29, Mr. Dickinson "mentioned to the House that on examining BLACKSTONE'S COMMENTARIES, he found that the terms 'ex post facto' related to criminal cases only; that they would not consequently restrain the States from retrospective laws in civil cases, and that some further provision for this purpose would be requisite."[18] The speaker injected this as a sort of an observation; it had no bearing on what was before the Convention at the time. He had evidently made it a point to look up his BLACKSTONE on the subject. It must be remembered that Dickinson was a lawyer of repute. He probably had been in doubt concerning the proceedings on the previous day and had gone to BLACKSTONE to settle the matter. He could hardly have been certain of the meaning of the term the day before, else he would have brought it to the attention of the Convention, for he did not hesitate to do so when he had satisfied himself as to BLACKSTONE'S definition of it. Again, he must have thought that there were others in the Convention who were either in doubt or ignorance, for he advised that some further

[16] HUNT & SCOTT, *op. cit.*, p. 479, note (*) at bottom of page.

[17] FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, vol. 2, p. 440, note 19. In answer to an inquiry from the writer, Mr. Gaillard Hunt, one of the editors of MADISON'S DEBATES cited above, gave his opinion on this note. He said, "I think they were used in the same signification in this note," in speaking of retrospective and *ex post facto.*

[18] HUNT & SCOTT, *op. cit.*, p. 483.

provision should be made. He must also have felt that many of the members believed that they had restrained the states in civil as well as criminal matters by placing a prohibition upon them in the passage of *ex post facto* laws. Otherwise his admonition would have been unnecessary. One must conclude that his colleagues needed enlightenment. Dickinson was a man of great wealth.[20]

Late in the Convention, Friday, September 14, Col. Mason moved to strike out from the clause (art. I, sec. 9), "no bill of attainder nor any ex facto law." He thought it not sufficiently clear that the prohibition meant by this phrase was limited to cases of a criminal nature, "and no Legislature ever did or can altogether avoid them in Civil cases." Gerry seconded the motion, but with a view "to extend the prohibition to 'Civil cases'; which he thought ought to be done."[21]

Here we get a glimpse of what may have been in Gerry's mind when he moved for a similar prohibition on the Congress of the United States. He seemed to think that they should comprehend civil as well as criminal cases. Otherwise, why extend the meaning in the prohibition on states? Mason must have felt that the Convention did not make it plain enough that they meant only criminal cases. Mason's motion was to limit the meaning of the clause to criminal cases and the Convention refused to do so. His motion was defeated. Mason enumerated this as one of the reasons for his opposition to the Constitution.[22]

In summing up the evidence as it appears in the debates in the Federal Convention, it seems as though it can be said with accuracy that the framers of the Constitution did not give evidence of using the term *ex post facto* in a technical sense. The tendency seemed to be to impart a civil meaning to the term; there is no evidence of the term being used in a different connection. It is constantly referred to in speaking of civil affairs, as contracts or paper money. It is also noticeable that there is not a single mention of the practice of the British Parliament to which Justice Chase referred in his opinion in *Calder* v. *Bull*. It is possible that this may have been a factor in causing the framers to insert the *ex post facto* provision

[20] BEARD, *op. cit.*, p. 87.
[21] HUNT & SCOTT, *op. cit.*, p. 565.
[22] FARRAND, *op. cit.*, vol. 2, p. 636.

in the Constitution, but it is not discernible in the debates on the point. Evidently, very different factors prompted them to insert the words in the Constitution. It is more than probable, judged by the debates themselves, that these men thought more of contracts and paper money in this connection than any lessons which might be learned from British parliamentary practice. They had experienced bills of attainder and *ex post facto* laws in the colonies themselves, and had little need to reach across the water for instruction in this matter. The fact that these men did think of safeguarding the paper money of that day, and their contracts, is not derogatory in the least. It may or may not have been caused by self-interest. But a sufficient explanation can be found in the ideas prevalent in the eighteenth century. Protections such as these were considered as essential to liberty as the personal liberty of citizens. Property protection was as vital as personal protection. Then, too, it cannot be denied that there were many at that time who held large sums of paper money and who feared that action on the part of state legislatures would injure the value of this money. This appears in the conventions held in the various states for the purpose of ratifying the Constitution, and has been hinted at in studies which have been made of the Constitution.

A study of the available records of the state ratifying conventions is informative. This information is not important because of its amount but rather from its character. Many of the delegates to the convention which framed the Constitution were also delegates to the state conventions which ratified the Constitution. In the Virginia convention such men as Marshall, Madison, Henry, Mason and Randolph were delegates. Some of these had also taken part in framing the Constitution. The opposition to the Constitution was quite bitter in the Virginia convention, and the opposition leaders, Henry and Mason, made many long speeches against the adoption of the instrument. The debates for the Virginia convention are quite well reported and a number of speeches are given on the *ex post facto* clauses in the Constitution.

Henry refused to be convinced that there was no need of a bill of rights in the Constitution because of the prohibitions on the Congress contained in the ninth section of article one. He brushed aside this contention by saying that these guarantees were so "feeble

and few, that it would have been infinitely better to have said nothing about it." But it was when he came to the subject of paper money that Patrick Henry became eloquent. He was very much afraid that the Northern states would force Virginia to help pay for paper money which when acquired was nearly worthless, but which the holders expected to redeem at a goodly rate as soon as the new government had been instituted. In this connection he came upon the *ex post facto* provision. He said: "If ex post facto laws had not been interdicted, they might also have been extended by implication at pleasure. Let us consider whether this restriction is founded in wisdom or good policy. If no ex post facto laws be made, what is to become of the old Continental paper dollars? Will not this country be forced to pay in gold and silver, shilling for shilling?"[23] Henry evidently considered *ex post facto* laws as being able to disturb civil matters, as, for example, currency. Henry was a lawyer and should have been acquainted with the meaning of the term, and if it were used in a technical sense should have restricted the use of the word to such a meaning. As a matter of fact, Henry was attacked by Randolph for failing to use the term in its technical sense. Randolph pointed out that *ex post facto* laws had reference only to criminal cases.[24] While it may not have any bearing on the matter, it might be mentioned here that Randolph held $16,000 of this paper money of which Mason and Henry were so afraid.[25] This may or may not have been a factor in the controversy. Henry was not convinced by Randolph's remarks, for when the debate proceeded to the next article, where the prohibition is on the states, he reiterated his fears that the state of Virginia would have to pay her share of the Continental money. He called attention to the rumor that the Northern states had acquired much of that money and would hold it at its nominal value.[26]

George Mason also spoke of *ex post facto* laws in connection with paper money. He held very little of this money.[27] Mason main-

[23] 3 ELLIOT'S DEBATES 471. Henry's speeches were sometimes quite long and were always sarcastic.

[24] 3 ELLIOT, 461.

[25] BEARD, *op. cit.*, p. 139.

[26] 3 ELLIOT 471.

[27] BEARD, *op. cit.*, 128.

tained that laws passed to relieve the threatening hardship on the states which held little of this paper money would be declared to be *ex post facto*.[28] Madison, in making some answers to these objections, did not call attention to the fact that such laws were only declared *ex post facto* when they were in the nature of punishments for criminal offenses. He could not have been aware that such was their meaning. However, this was a poorly reported speech, as the latter portion of it was so low that it was not audible to many members of the convention.[29]

George Nicholas, in speaking against Henry, denied that the legislature of Virginia had any right to make a law which interfered with the Continental debts, saying: "Have they a right to make ex post facto laws?" He answered his own question with an emphatic "No, sir!" Nicholas also couples this with the right to make laws impairing the obligation of contracts, which he also denies to the states. His opinion was that the states never could exercise these powers, for, "such general objects being vested in Congress," they are excluded from any power over them. In closing, he observed that the holders of paper money would have to make application to Congress for regulation and discharge of this currency. He met Henry upon the latter's ground, as though there was nothing wrong in using *ex post facto* in connection with the subject of paper money.

Randolph again took the floor and asserted that if any proof were needed as to the true meaning of the term that proof was to be found in their position in the text of the Constitution, placed as they are in connection with the bills of attainder. He insisted that the words had a technical meaning and they were so used in the Federal Convention.[31] At this Mason launched forth into a harangue on the question of technical *versus* non-technical use of the words. Mason argued that whatever the technical meaning might be it was commonly understood that the terms meant exactly what the words literally imported, and that unless some express provision were made to the contrary it would be necessary for people to consider such to be the case, and it would devolve upon

[28] 3 ELLIOT 472.
[29] *Ibid.*, p. 473.
[31] 3 ELLIOT 477.

the Federal judges to give them that construction. He asked: "Are we to trust business of this sort to technical definition?"[32]

It is interesting to note that in the debates in the Virginia convention Randolph alone maintained that the words were limited to a criminal import. Mason, Henry, Nicholas and Madison treated and used the terms as though they comprehended civil and criminal matters. In fact, the reported debates give no evidence of their using the term *ex post facto* in connection with a criminal case. It does not appear in the record that Marshall took any part in the debate at this point.

The only other state convention of which any debates on this question are recorded is that of North Carolina. It can hardly be an accident that the discussion which took place in the North Carolina convention, like that in the Virginia convention, centered around the subject of paper money. In reading the North Carolina records one notes the lack of any reference to a criminal connotation of the term *ex post facto*. There are some direct references to civil matters.

Mr. Cabarrus, speaking on the subject of bills of credit, held that the prohibition on the states emitting bills of credit would not affect paper money. His theory was that the Constitution was an instrument for the future government of the United States, and not for the past. Furthermore, "this Constitution declares, in the most positive terms, that no ex post facto law shall be passed by the general government. Were this clause to operate retrospectively, it would clearly be ex post facto, and repugnant to the express provision of the Constitution. How, then, in the name of God, can the Constitution take our paper money away?"[33] Here is another case of a use of the term *ex post facto* as synonymous with retrospective. It is another case of linking *ex post facto* laws with the subject of paper money.

But Mr. Bloodworth took a different view. This gentleman wished to know if the "payment of sums now due be ex post facto."[34] He did not differ from the preceding speaker in the use of the phrase, as far as content and meaning is concerned.

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[32] *Ibid.*, 479.

[33] 4 ELLIOT 184.

[34] *Ibid.*, 184.

Perhaps the most interesting comment to be found in any of the reports on the clauses in point, in the state convention records, is that of Iredell, who was a member of the North Carolina convention. Iredell was later to sit on the bench with Justice Chase in the case of *Calder* v. *Bull,* concurring with the latter justice in his opinion. In the Carolina convention he spoke just after Mr. Bloodworth. His words were as follows: "Mr. Chairman, with respect to this clause, it cannot have the meaning contended for. There is nothing in the Constitution which affects our present paper money. It prohibits, for the future, the emitting of any, but it does not interfere with the paper money now actually in circulation in several states. *There is an express clause which protects it. It provides that there shall be no ex post facto law.* This would be ex post facto, if the construction contended for were right, as has been observed by another gentleman."[35] To compare this statement with his opinion in the case of *Calder* v. *Bull* is interesting. In that case he said: "Still, however, in the present instance, the act or resolution of the legislature of Connecticut cannot be regarded as an ex post facto law; for the true construction of the prohibition extends to criminal, not to civil, cases. It is only in criminal cases, indeed, in which the danger to be guarded against is greatly to be apprehended."[36] One might wonder why Iredell did not call this to the attention of his convention colleagues a decade earlier. He may have held the opinion of another justice who sat upon the same bench a little over a century later, that what a person may think subjectively, as a person or legislator, may not be what he must think when a judge, considering the problem objectively. What he may think constitutional as a legislator may be looked upon by the same man as unconstitutional when he is a judge.[37] Another explanation is possible, a very simple one, namely, that Iredell had learned more of law in the intervening years.

The record of one other state convention throws some light upon this problem. There is a reference to it in the New York convention records, though there appears to have been no debate upon the

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[35] 4 ELLIOT 185. (Italics by the writer.)

[36] 3 Dallas 399.

[37] See comment on Justice White in article by Professor Robert E. Cushman, 4 MINN. L. REV. 275.

point in that convention. When the convention came to consider sections, 8, 9, and 10, these sections of article I were read by the secretary, and amendments were moved to them, without any debate. The record shows that Mr. Lansing moved, "Respecting ex post facto laws; Provided, that the meaning of ex post facto laws shall not be construed to prevent calling public defaulters to account, but shall extend only to crimes."[38] Mr. Lansing was a lawyer, though not a brilliant one.[39] He must have felt that there was some danger of a civil meaning being given to the words. His amendment was one of those submitted to Congress by the New York convention.[40]

It will be seen, therefore, that a study of the records of the state conventions strengthens the conclusion arrived at following the study of the convention which framed the Constitution. One can hardly feel that the term *ex post facto* was intended to be limited to criminal cases when it was embodied in the text of the Constitution. Several of the men who use the phrase as though it comprehended civil as well as criminal matters were lawyers. The only evidence which indicates that the words were used in a technical sense is that of Randolph in the Virginia convention. On the other hand, nearly every other speaker can be cited as indicating a non-technical usage. The connection in which the term was used is of significance, and it has been mentioned that it was used almost exclusively, in the conventions, with regard to civil matters. Such evidence as is available as to the intent of the framers of the Constitution, therefore, would tend to contradict the position taken by Justice Chase.

But Justice Chase also refers to the FEDERALIST, and pays the author, presumably Hamilton, a high tribute. While the FEDERALIST is not as authoritative as the records of the conventions, still it is generally recognized as carrying great weight as a commentary on the Constitution. There are two numbers of the FEDERALIST which contain comments on *ex post facto* laws. One is by Hamilton, the other is by Madison. It is natural that Hamilton should consider *ex post facto* laws as relating to criminal cases, if BLACKSTONE was understood to support this view, for Hamilton relies on

[38] 2 ELLIOT 407.

[39] BEARD, *op. cit.*, p. 123.

[40] FEDERALIST (Ford ed.), p. 641.

BLACKSTONE as his authority.[41] It is therefore necessary to examine BLACKSTONE'S comment on this point. After a study of the passage in BLACKSTONE it does not appear that he is an authority strictly in point. The words of Justice Johnson on this passage seem to analyze it accurately. After refuting the argument of Justice Chase that Woodeson supported his view, Johnson says: "Judge Blackstone is by no means conclusive, if any authority at all upon the subject. ARCH. & CHRIST. BLACK. 41, OLD EDIT. 46. He is commenting upon the definition of a law generally; and that member of the definition which designates it as 'a rule prescribed.' And when illustrating the nature and necessity of this attribute of a law, he illustrates it by referring to the laws of Caligula, written in small characters, and hung up out of view, to ensnare the people; and then remarks, 'There is still a more unreasonable method than this, which is called making of laws ex post facto; where, after an action, indifferent in itself, has been committed, the legislator then for the first time, declares it to have been a crime, and inflicts a punishment upon the person who has committed it.'

"This is precisely what Woodeson calls a penal statute, passed ex post facto; but it by no means follows, that because a penal statute may be ex post facto, that none other can be affected with that character; and certainly his commentator, Mr. Christian, in his note upon the phrase 'ex post facto,' seems to have had no idea of this restrictive application of it. His words are: 'an ex post facto law may be either of a public or a private nature; and when we speak generally of an ex post facto law, we perhaps, always, mean a law which comprehends the whole community. The Roman *privilegia* seem to correspond to our bills of attainder, and bills of pains and penalties, which, though in their nature they are ex post facto laws, yet are seldom called so.' Here he speaks of a *law,* not of a *penal* law, which comprehends the whole community; and of certain penal laws, in *their nature* ex post facto; that is, of the description of ex post facto laws; which they certainly are, without being exclusively so."[42]

Madison is supposed to be the author of the other number of the

[41] FEDERALIST (Ford ed.), p. 571. Hamilton quotes directly from Blackstone.

[42] 2 Peters 684.

FEDERALIST which bears on this question. But Madison does not give an explicit definition of the term. It is not clear that he confines the meaning of the term to criminal matters.[43] Madison seems to have consistently held to the view that *ex post facto* laws had a broader meaning than a technical use would suggest. This appears from his words in the Federal Convention, in the Virginia convention, and in the FEDERALIST.

Justice Johnson's opinion on the other portions of the decision in *Calder* v. *Bull* are also interesting. It might be noted here that Johnson had the advantage over Chase of having access to the printed Journal of the Federal Convention, which was not accessible to Chase.[44] This opinion of Justice Johnson is found in a note appended to *Satterlee* v. *Matthewson*.[45] The Justice thought that the decision in the *Calder* case caused much trouble in later years, for he said in *Satterlee* v. *Matthewson*: "The whole of this difficulty arises out of that unhappy idea, that the phrase 'ex post facto,' in the Constitution of the United States, was confined to criminal cases exclusively; a decision which leaves a large class of arbitrary legislative acts without the prohibitions of the Constitution."[46] He then adds that he is subjoining a note which embodies the results of his investigation in the subject.

In this note Johnson takes up, point by point, the argument of Justice Chase. Among other things, he denies to the case of *Calder* v. *Bull* the force of an adjudication in point. He maintains that it was not necessary to the disposition of the case that a decision be made on *ex post facto* laws.[47] Justice Johnson also believed that

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[43] FEDERALIST, p. 295.

[44] The Journal was first published in 1819.

[45] 2 Peters 380. Appendix I, p. 681.

[46] 2 Peters 416.

[47] *Ibid.*, p. 682. After examining in some detail the arguments of each of the justices in Calder v. Bull, Johnson says: "Thus it appears that all the judges who sat in the case of Calder v. Bull concurred in the opinion, that the decision of the court of probate, and the lapse of the time given for an appeal to their court of errors, were not final upon the rights of the parties; that there still existed in the legislature a controlling and revising power over the controversy; and that this was duly exercised in the reversal of the first decree of the court of probate. And who can doubt that the legislature of a state may be vested by the state constitution with such a power when so delegated. * * *

there was a mistaken view prevalent as to the roots and original meaning of the term.[48] He also attacks the argument that the position of the phrase in the text of the Constitution is indicative of its technical meaning, being placed as it is right next to the provision prohibiting bills of attainder. His contention in this matter may not be more weighty than the contention to the contrary by the judges in the *Calder* case, for it is a matter fraught with danger of error to depend upon such textual criticism as is involved in this case. But of the two arguments, that of Justice Johnson probably would appeal as the more reasonable. He said: "For by placing 'ex post facto' laws between bills of attainder, which are exclusively criminal, and laws violating the obligation of contracts, which are exclusively civil, it would rather seem that *ex post facto laws* partook of both characters, was common to both purposes."[49] As to the use of the term in the state constitutions, Johnson holds that heir use was not such as to support the view taken by Justice Chase. He even shows that there is ground for believing that Chase himself was instrumental in restricting its use so as to be limited to criminal cases.[50] The above are among the more important observations to be found in this note by Justice Johnson, whom Story

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"How then could the question whether the phrase 'ex post facto' was confined to criminal laws arise in this cause? the law complained of was equally free from that characteristic; though the phrase be held to extend to laws of a civil character. I have then a right to deny that the construction intimated by three of the judges, in the case of Calder v. Bull, is entitled to the weight of an adjudication."

[48] *Ibid.*, 683.

[49] *Ibid.*, 687.

[50] *Ibid.*, 685. "Some of the state constitutions are also referrtd to, as furnishing an exposition of the words ex post facto, which confine its application to criminal cases. But of the four that have been cited, it will be found that those of Massachusetts and Delaware do not contain the phrase; and, as if sensible of the general application of its meaning to all laws, giving effects and consequences to past actions, which were not attached to them when they occurred, simply give a description of the laws they mean to prohibit, without resorting to the aid of a quaint phrase which can only be explained by an extended periphrasis." See also *ibid.*, 686: "Maryland first used it in this restricted sense, and North Carolina copied from Maryland; and if the evidence of contemporaries may be relied on, Mr. Chase was one of the committee who reported the Constitution of Maryland; and thus stands the authority for the restricted use."

called "learned." The fact that this opinion was expressed so late, 1829, may account for the little heed which was paid to it. The law had been settled.

A study of some of the correspondence of the prominent men in law and politics of that day, though not exhaustive, does not reveal any new information upon the problem of *ex post facto* laws and their meaning in the Constitution. There is, however, a very significant letter written to the governor of Connecticut, transmitting a copy of the Constitution as framed by the Convention of 1787, to be presented to the state convention for consideration. The writers were Sherman and Ellsworth. The latter was to become Chief Justice of the Supreme Court in a short while. On that account this letter is of interest. The portion of the letter in point is as follows: "The restraint on the legislatures of the several states respecting emitting bills of credit, making anything but money a tender in payment of debts, or *impairing the obligation of contracts by ex post facto laws,* was thought necessary as a security to commerce, in which the interest of foreigners, as well as of the citizens of the different states, may be affected."[51] This is a very direct statement which would seem to be of weight.

Even at this late day a writer of high scholastic standing has written: "Until 1798, the provision generally regarded as offering the most promising weapon against special legislation was the ex post facto clause."[52] It would seem as though there have been reputable authorities, both past and present, who incline to the view that the *ex post facto* provisions of the Constitution prohibited civil as well as criminal legislation, when judged by the intention of the framers of the Constitution and by the understanding of the people of that day.

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[51] See reprint in FARRAND, *op. cit.*, vol. 3, p. 100.

[52] CORWIN, op. cit., p. 149.